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IN THE ~~JUVENILE AND DOMESTIC RELATIONS DISTRICT~~ CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

MARY F. REY
CLERK CIRCUIT COURT
FAIRFAX, VA

COMMONWEALTH OF VIRGINIA,	)	
v.	)	Criminal No. 102888
LEE BOYD MALVO,	)	
Defendant.	)	

NOTICE AND MOTION TO SUPPRESS

PLEASE TAKE NOTICE THAT on Monday, April 28, 2003 at 10:00 a.m., or as soon thereafter as counsel may be heard, the Defendant Lee Boyd Malvo, by and through counsel, shall move this Honorable Court to Suppress any and all statements made by him during an extended interrogation on November 7, 2002 in the Massey Building in Fairfax County. In support thereof, M.r. Malvo relies on the memorandum attached hereto.

Respectfully Submitted,

LEE BOYD MALVO
By Counsel

MARTIN, ARIF, PETROVICH & WALSH

By:
~~Michael~~ S. Arif, Esquire
for Craig Cooley, ~~Esquire~~
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Springfield, VA 22151
(703) 323-1200
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Counsel for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT true and accurate copies of the foregoing Notice and Motion, and accompanying Memorandum, were hand-delivered to Robert F. Horan, Esq., Commonwealth's Attorney, on this the 11th day of April, 2003.

Michael S. Arif

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA

v.

LEE BOYD MALVO,

Defendant.

Criminal # 102888

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS STATEMENTS

I. FACTS

1. Lee Boyd Malvo, who was born in Jamaica and is a citizen thereof, was originally arrested on October 24, 2002 after law enforcement agents encountered both him and Mr. John Allen Mohammad in a blue Caprice in Meyersville, Maryland. (See Exhibit 1).

2. Based on Federal charges, he was arrested and read his rights; he remained silent and was taken into custody in Maryland.

3. His original detention was based on a Federal Material Witness warrant, dated October 23, 2002. (See Exhibit 2).

4. A hearing was held on October 24, 2002, in the United States District Court for the District of Maryland, Northern Division (Baltimore). Present at the hearing, among others, were:

- Mr. Donald Donovan; Chief Deputy Marshal; United States Marshal Service;
- Mr. William Henry; Chief, United States Probation and Pretrial Services;
- Mr. Christopher Braga; Special Agent; Federal Bureau of Investigation;
- Mr. Scott Riordan; Special Agent; Bureau of Alcohol, Tobacco and Firearms;
- A. David Copperthite, Esquire; Assistant United States Attorney;
- James M. Trusty, Esquire; Assistant United States Attorney;
- Joshua R. Treem, Esquire; Counsel for Mr. Malvo;
- Andrew Jay Graham, Esquire, Guardian Ad Litem for Mr. Malvo; and

- Max Higgins Lauten, Esquire, Guardian Ad Litem for Mr. Malvo.

At that hearing, an issue was addressed, based on Mr. Malvo's silence until that point in time, whether or not he spoke and understood English. David Copperthite, Esquire stated "we possess, a video that was created today while he was being advised or *when he was interviewed by the police officers*, that he did nod and understand what they were saying." (See Exhibit 3).

5. At that 10/24/02 hearing, upon being advised of his rights, Mr. Malvo invoked his right to remain silent and did not speak to authorities at all. (See Exhibit 3)

6. On 10/24/02, Joshua Treem, Esquire was appointed counsel for Mr. Malvo. (See Exhibit 4).

7. Subsequently, the material witness charges were dismissed pursuant to a Motion to Dismiss the same, dated 10/29/02. The motion to dismiss the material witness charges states, *inter alia*, " . . . John Doe Juvenile is no longer a material witness, but is now charged with offenses set forth in the Criminal Information," and was filed by A. David Copperthite, AUSA. (See Exhibit 5).

8. Shortly thereafter, Mr. Malvo was charged in a 20-count Criminal Information in the United States District Court for the District of Maryland (Case No. 02-CR-0474), which alleged violations of 18 U.S.C. §§ 371, 1951 & 1952.

9. The Criminal Information ostensibly includes of alleged shootings which occurred in Maryland, The District of Columbia and Virginia. Various counts in the information include wording to the effect of [Mr. Malvo] "did knowingly travel in interstate commerce from the Commonwealth of Virginia to the State and District of Maryland (other counts use the wording 'from the State and District of Maryland to the Commonwealth of Virginia'), with the intent to commit crimes of violence, to wit, murders, to further an unlawful activity, to wit, extortion in violation of 18 U.S.C. §1951." (See Exhibit 6).

10. All of Mr. Malvo's court proceedings were held in the Federal District Courthouse in Baltimore, Maryland, while the co-defendant, John Allen Muhammad's proceedings were held in the Federal District Courthouse in Greenbelt, Maryland.

11. Mr. Malvo was also formally charged in the State District Court of Maryland for Montgomery County with two counts of first degree murder on 10/25/02. (See exhibit 7);

12. On 10/25/02, Mr. Malvo was also formally charged in the Spotsylvania County Juvenile and Domestic Relations Court with two counts of capital murder (pursuant to Virginia Code §§ 18.2-31(8) & 18.2-31(13)), one count of conspiracy to commit capital murder (pursuant to Virginia Code §§ 18.2-10 & 18.2-22), one count of use of a firearm (pursuant to Virginia Code § 18.2-53.1), one count of attempted capital murder (pursuant to Virginia Code § 18.2-25), one count of attempted use of a firearm (pursuant to Virginia Code § 18.2-53.1) and one count of malicious wounding (pursuant to Virginia Code §§ 18.2-10 & 18.2-51.2(A)). (See Exhibit 8).

13. On 10/28/02, Mr. John Mohammad, an alleged co-defendant, was indicted in Spotsylvania County pursuant to a direct indictment, for the same charges. (See Exhibit 9).

14. Upon information and belief, on 10/28/03, a petition was filed against Mr. Malvo in the Prince William County Juvenile and Domestic Relations District Court alleging capital murder and use of firearm charges as listed above.

15. On 10/28/03, co-defendant John Muhammad was indicted in the Prince William County Circuit Court and charged with counts of capital murder and use of a firearm.

16. On 10/29/02, The United States District Court for the District of Maryland entered an order appointing Mr. A.J. Kramer, Federal Public Defender for the District of Columbia, Mr. Robert Tucker, Assistant Federal Public Defender, and the Federal Public Defender's office as counsel for Mr. Malvo. The Court also continued the appointment of Mr. Joshua Treem as co-counsel for Mr. Malvo. The order states in part "pursuant to . . . the Sixth Amendment to the United States Constitution." (See Exhibit 10).

17. Also on 10/29/02, The United States District Court for the Eastern District of Maryland entered an order appointing Andrew J. Graham, Esquire and Max Lauten, Esquire as guardians ad litem for Lee Boyd Malvo. (See Exhibit 11).

18. Throughout the initial period during which Mr. Malvo was in custody in Maryland, and prior to the appointment of counsel, Mr. Malvo was approached by law enforcement and attempts were made to question him. However, he remained silent at all times, never waiving his 5th Amendment rights. Upon his appointment, Mr. Treem made it clear to various prosecuting and law enforcement personnel, both inside and outside of the courtroom, that Mr. Malvo intended to remain silent, would not waive his 5th Amendment rights, and should not under any

circumstances be questioned outside his attorneys' presence.

19. While Mr. Malvo was in custody in Maryland, a prosecutor from Montgomery County publicly stated that he was going to make arrangements for law enforcement officers to question Mr. Malvo. Acting as his counsel, and consistent with the above understanding, Mr. Treem immediately reiterated to law enforcement authorities that no such questioning would be permitted without his presence.

20. Furthermore, this understanding concerning Mr. Malvo's right and desire to have his attorney(s) present during any questioning was shared by all parties involved, including the court.

21. Mr. Malvo's Detention Hearing was held in the United States District Court for the District of Maryland, Northern Division (Baltimore) on November 4, 2002. Present at the hearing were:

- Mr. Hughes; United States Marshal;
- Mr. Donovan; Chief Deputy Unites States Marshal;
- Mr. Scott Reordan; Special Agent; Bureau of Alcohol, Tobacco and Firearms;
- Ms. Linda Hooper; Supervisory Special Agent; Federal Bureau of Investigations;
- Mr. Michael McCoy; Special Agent; Federal Bureau of Investigations;
- Jim Trump, Esquire; Assistant United States Attorney in the Eastern District of Virginia;
- Mr. Ken Langston; United States Pretrial Services;
- Mr. Richard Henry; Deputy Marshal; United States Marshals Service; Prince George's County;
- David Copperthite, Esquire; Assistant United States Attorney;
- James Trusty, Esquire; Assistant United States Attorney;
- Joshua R. Treem, Esquire; counsel for Mr. Malvo;
- A.J. Kramer, Esquire; counsel for Mr. Malvo;
- Robert Tucker, Esquire; counsel for Mr. Malvo;
- Andrew J. Graham, Esquire; Guardian *ad litem* for Mr. Malvo.

(See Exhibit 12).

22. In a pre-Detention Hearing Order dated October 29, 2002 Judge Bredar stated "the Court's Pretrial Services Office is relieved from attempting to interview the juvenile upon the representation of counsel for the juvenile that the juvenile will not speak to representatives of the

Office." (Exhibit 13 , ¶2).

23. Despite the fact the proceedings against Mr. Malvo had all taken place in the Baltimore Federal Courthouse, on November 7, 2002 a dismissal of all federal charges was requested by the United States and signed *in judge's chambers* in the Federal Courthouse in Greenbelt, where proceedings against co-defendant Mohammad had taken place. None of the attorneys for Mr. Malvo had been given notice of the dismissal, or even made aware of the request. Judge Bredar was also unaware of these actions by the Government. (See Exhibit 14).

24. In the weeks following November 7, 2002, in direct response to the above-described actions taken by the United States, the United States District Court for the District of Maryland issued Administrative Order 2002-3. The order provides limitations on the transportation of individuals in custody unless the court is notified and that "[n]o attorney for the government shall seek an order dismissing any charge filed against a defendant represented in this District by counsel without giving proper notice to defense counsel or obtaining permission form the court not to provide such notice. (See Exhibit 15).

25. On November 7, 2002, Mr. Malvo was brought from Maryland to Virginia, arriving eventually in Fairfax County. He began his journey that day at around 8:00 a.m., was brought initially to the Alexandria Detention Center where he arrived sometime around 10 or 11:00 a.m., and was delivered to his final destination in Fairfax some time around 4:00 p.m. On that day, Mr. Malvo did not appear in court, he did not see an attorney, and was never told where he was being brought. Nor was he given notice about the status of the Maryland charges (both Federal and State).

26. During the afternoon on November 7, 2002 while Mr. Malvo was in the Alexandria Detention Center, Lisa Greenman, Esquire, co-counsel for co-defendant John Muhammad, was denied access by the Alexandria Adult Detention Center to see her client. She subsequently contacted Robert Tucker, Esquire, who was preparing to meet with Mr. Malvo in Virginia at the Alexandria Adult Detention Center, and informed him of the denial of access to the client.

27. On November 7, 2002, Mssrs. Treem, Kramer and Tucker were specifically ordered to continue their duties as counsel for Mr. Malvo in the form of a letter, which was provided to the United States Attorneys involved in the prosecution of the Federal charges. The order signed

by Judge Bredar states "to the extent that there are parallel proceedings in state court relating to the same matters that have been the subject of your representation in the federal proceedings, then, until such time as other competent counsel have assumed responsibility for the representation of your clients, you should treat those matters as "ancillary matters" within the meaning of 18 U.S.C. § 3006A(c) and continue to represent your clients pursuant to this Court's earlier orders." Judge Bredar later notes that "this letter constitutes an ORDER of the Court and shall be docketed as such." (See Exhibit 16).

28. His initial destination on November 7, 2002 was the Alexandria Detention Center, the facility where federal prisoners are held. Mr. Malvo was not provided lunch, and stayed in receiving until around 3:00 p.m. At that point, he was transported via van to the Fairfax County Detention Center, where he was held in the transportation bay long enough to switch from the marshals' handcuffs to those belonging to Fairfax County Police. He was immediately placed in another van, and transported to the Fairfax CIB building (The Massey Building), accompanied by Det. June Boyle. He ultimately arrived on the 4th or 6th floor of that building at around 4:00 p.m., still clothed in his red federal prisoner jumpsuit. To that point, Mr. Malvo had still not been told where he was or why he was there; more notably, he had not been before a Magistrate nor the Juvenile Intake Officer who was available in her office through midnight that night.

29. Also on November 7, 2002, at approximately 2:00 p.m., Robert Tucker, Esquire, one of Mr. Malvo's court-appointed attorneys, informally discovered, without any prior notice or assistance from the Government, that his client was being transported to Virginia. Shortly thereafter, Mr. Tucker sent correspondence, via facsimile, to Paul McNulty, Esquire, the United States Attorney for the Eastern District of Virginia, to inform him of the understanding established in Maryland that no law enforcement officers (federal or state) should talk to Mr. Malvo without his attorneys present. (See Exhibit 17)

30. Additionally, on October 29, 2002 Judge Bredar had ordered that "[t]he government is directed to take forthwith such steps as are necessary to ensure that a consular official of the Jamaican government is aware of the identity of the juvenile, the charges pending against him, that he is held in official detention by the United States Government pursuant to Court order, the location of the place of detention, and the identity and telephone number of the attorney

appointed to represent the juvenile." (See Exhibit 13).

31. Despite the covert and intentionally deceptive actions taken by the Government to transport Mr. Malvo to Virginia without notice to his attorneys of record on November 7, 2002, on November 6, 2002, a Petition had already been filed in the Fairfax County Juvenile and Domestic Relations District Court, and judicial proceedings against Mr. Malvo had already been formally initiated. On November 6, 2002, he was formally charged with two counts of Capital Murder, and one count of use of a firearm (Virginia Code §§ 18.2-31(8), 18.2-31(13), 18.2-53.1). The Petition was signed by Detective June Boyle. (See Exhibit 18).

32. Also on November 6, 2002, co-defendant John Muhammad was indicted in the Fairfax County Circuit Court for the same charges, based solely on grand jury testimony from Detective Boyle. (See Exhibit 19).

33. Also on November 7, 2002, a Guardian *ad litem*, Todd Petit, Esquire, was appointed to Mr. Malvo's case.

34. At around the same time that the interrogation began on November 7, 2002, Mr. Petit was desperately trying to have contact with his ward. He initially tried getting in to see Mr. Malvo in the Massey Building, where he was eventually threatened with a trespassing charge. Mr. Petit then went to the Fairfax County Commonwealth's Attorney's office and asked to speak with Mr. Horan, where he was told to leave because it was after business hours;

35. When in CIB, Mr. Malvo first encountered Detective June Boyle, who was with him for about five minutes before FBI Agent Garrett joined her. Law enforcement officers told Mr. Malvo that they wanted to talk to him.

36. Initially, Mr. Malvo indicated he did not want to speak to the officers, and twice asked to see his attorney. According to Detective Boyle, after a few statements concerning what Mr. Malvo wanted to eat (he had not been fed lunch or dinner to that point). Mr. Malvo asked "do I get to see my attorney?", to which Det. Boyle responded "yes." Mr. Malvo then said that his lawyer told him not to talk to the cops until they got here. Then, according to Boyle, "it was explained to him that he was being charged in Virginia with new charges and that the police wanted to get some information about him. He said o.k."

37. After an unspecified period of seemingly general conversation, Mr. Malvo began

making statements that were arguably inculpatory. At that point, Detective Boyle claims she then said, "It sounds like you want to talk about this case but we need to go over Miranda and read you your rights." Mr. Malvo was then advised of his Miranda rights. When asked if he would sign the form, he said "there's a reason I can't write it; its self-incriminating." Detective Boyle then asked him if he wanted to "sign" it with an "X," and Mr. Malvo agreed to do that.

38. In addition to the "X", the signatures of both Detective Boyle and Agent Garrett (signed "FBI Garrett") appear at bottom of form.

39. There is a question on the form which asks "Juveniles, do you want a parent/guardian here before we interview you?" The space for a response to this question is left blank.

40. Subsequent to placing the "X" on the Miranda form, Mr. Malvo did answer questions posed by Office Boyle, but provided responses that included dubious information.

41. Interestingly, it is the position of the Commonwealth that none of the initial interrogation, leading all the way up to just after Mr. Malvo put an "X" on the Miranda rights form, was recorded. Coincidentally, all of the interrogation after that point was recorded. Thus, the parties are seemingly completely dependent on the recollections of Detective Boyle and Agent Garrett to determine what statements were actually made by Mr. Malvo with regard to his desiring counsel and then putting an "X" on the Miranda rights form.

42. It was also on November 7, 2002, that the Clerk's office of the Juvenile and Domestic Relations District Court was in contact with Michael Arif, Esquire regarding his being appointed as defense counsel for Mr. Malvo; the following day Mssrs. Arif, Thomas Walsh, Esquire and Mark Petrovich, Esquire were appointed in court by Judge Maxfield to represent Mr. Malvo on the instant charges.

II. LEGAL ARGUMENTS

A. THE ALLEGED CONSTITUTIONAL VIOLATIONS ARE AFFORDED HEIGHTENED SCRUTINY DUE TO MR. MALVO'S JUVENILE STATUS

The United States Supreme Court has long recognized the need for additional scrutiny when analyzing whether the constitutional rights of a juvenile have been violated. For example, in Gallegos v. Colorado, 370 U.S. 49, 54 (1962), the Court stated that

> [the juvenile defendant] cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions. He would have no way of knowing what the consequences of his confession were without advice as to his rights - from someone concerned with securing him those rights - and without the aid of more mature judgment as to the steps he should take in the predicament in which he found himself. A lawyer or an adult relative or friend could have given the petitioner the protection which his own immaturity could not.

While a "totality of the circumstances" analysis applies in juvenile cases as well as adult cases, the factors and circumstances evaluated are not the same. Factors that are considered regarding juvenile cases include

> [t]he youth of the petitioner, the long detention, the failure to send for his parents, the failure immediately to bring him before the judge of the Juvenile Court, the failure to see to it that he had the advice of lawyer or a friend - all of these combine to make us conclude that the formal confession on which this conviction may have rested (see Payne v. Arkansas, 356 U.S. 560, 568) was obtained in violation of due process.

Id. at 56. The United States Supreme Court has also noted and emphasized inherent distinctions between juveniles and adults when considering the validity of confessions and Constitutional rights. "With respect to juveniles, both common observation and expert opinion emphasize that the 'distrust of confessions made in certain situations' [alluded to elsewhere in the opinion], is imperative in the case of children from an early age through adolescence." In Re Gault, 387 U.S. 1, 48 (1967).

The special consideration given juvenile confessions and the related constitutional issues has been well established in Virginia courts as well. In deciding Grogg v. Commonwealth, 6 Va. App. 598 (1988), the Virginia Court of Appeals recognized the added care necessary in determining whether juveniles' statements made while in custody are voluntary.

> As the Supreme Court held in Gault, 'the greatest care must be taken to assure

> that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.' 387 U.S. at 55; *see also Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962); *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948); *Williams v. Peyton*, 404 F.2d 528, 530-31 (4th Cir. 1968).

Grogg, 6 Va.App. at 612-13. The Grogg court also addressed the importance of having someone there to assist a juvenile in a setting where police are applying pressure to obtain incriminating statements.

> We hold that, in the case of a juvenile, the presence or absence of a parent, guardian, independent interested adult, or counsel is a circumstance and factor to be considered in the totality of the circumstances when determining whether a waiver is knowing and intelligent. The absence of a parent or counsel is 'a circumstance that weigh[s] against the admissibility of the confession.' *Miller v. Maryland*, 577 F.2d 1158, 1159 (4th Cir. 1978).

Id. at 613.

B. MR. MALVO'S SIXTH AMENDMENT RIGHTS WERE VIOLATED

1. The Sixth Amendment right to counsel

As the United States Supreme Court has stated, the "Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." Maine v. Moulton, 474 U.S. 159, 176 (1985). Its purpose "is to protect the unaided layman at critical confrontations with his expert adversary, the government, after the adverse positions of government and defendant have solidified with respect to a particular alleged crime." McNeil v. Wisconsin, 501 U.S. 171, 177-78 (1991).

Additionally,

> knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such

> an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

Maine v. Moulton, 474 U.S. 159, 176 (1985); See also Frye v. Commonwealth, 231 Va. 370, 391 (1986).

2. The right attaches when formal charges are initiated

A prosecution is commenced "at or after the initiation of adversary judicial criminal proceedings - whether by way of *formal charge*, preliminary hearing, indictment, information, or arraignment." McNeil, 501 U.S. at 175, United States v. Gouveia, 467 U.S. 180, 188 (1984) (emphasis added). In fact, "[t]he law is well settled that an accused is guaranteed the right to the assistance of counsel at any stage of the criminal prosecution where counsel's absence might derogate from the right to a fair trial." Shifflett v. Commonwealth, 5 Va App. 277, 281, 361 S.E.2d 783, ___ (1987).

Additionally, the Supreme Court has said that "our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings 'is far from a mere formalism.'" Michigan v. Jackson, 475 U.S. 625, 631 (1986); Kirby v. Illinois, 406 U.S., at 689.

It is also important to note that "[j]ust as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis" Michigan v. Jackson, 475 U.S. 625, 635, and "if the police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is

invalid." Id., at 636.

Mr. Malvo had Sixth Amendment rights attach when formal charges were filed in the Spotsylvania County Juvenile and Domestic Relations Court on October 25, 2002, in the Prince William County Juvenile and Domestic Relations Court on October 28, 2002 and in the Fairfax County Juvenile and Domestic Relations Court on November 6, 2002. The Commonwealth cannot directly indict a juvenile for a criminal offense; process must be initiated by filing a petition in the Juvenile and Domestic Relations District Court. Virginia Code § 16.1-260(A); Burfoot v. Commonwealth, 23 Va. App. 38, 45-46 (1996). The juvenile petitions filed against Mr. Malvo were the very essence of "formal charge" as contemplated in the phrase "by way of *formal charge*, preliminary hearing, indictment, information, or arraignment." McNeil, 501 U.S. at 175, United States v. Gouveia, 467 U.S. 180, 188 (1984) (emphasis added).

Focusing on the Fairfax petition as an example for all the petitions filed against Mr. Malvo, it is even clearer that the Commonwealth formally commenced adversarial proceedings before November 7, 2002 when one considers that the Commonwealth direct-indicted John Muhammad on November 6, 2002 in Fairfax County, the same day it filed the Petition charging Mr. Malvo. Clearly, it was the intention of the authorities to charge the co-defendants in the same manner. However, since there is no method by which to indict a juvenile, the authorities were forced to initiate formal proceedings against Mr. Malvo in the only way possible - by filing a Petition in juvenile court. It would frustrate justice indeed if Mr. Malvo's status as a juvenile caused him to have less, rather than more, protection under the Constitution than his adult co-defendant.

Furthermore, when the Petition was filed in Fairfax, Mr. Malvo had been in custody for

two weeks, and had been formally charged in four other jurisdictions (Federal Court; Spotsylvania County, and Hanover County in Virginia; and Montgomery County in Maryland), the least serious the charges being attempted murder.

The Petition was signed by Detective June Boyle, the officer who provided the sole testimony to the grand jury to indict John Muhammad on November 6, 2002, and one of the officers who interrogated Mr. Malvo on November 7, 2002. She was therefore aware at the time of his interrogation of the formal charges that had been filed against him and his co-defendant, as well as his extended custody in Maryland.

On November 6, 2002, Mr. Malvo was formally charged in Fairfax County, and his Sixth Amendment right to counsel attached with regard to that charge on that date. Similarly, his Sixth Amendment right to counsel attached on the dates indicated above with regard to all other charges in all other jurisdictions in which petitions were filed. That would include all charges in Spotsylvania County, Prince William County and possibly Hanover County (counsel has not yet been provided access to the records in Hanover County).

3. Mr. Malvo had a Sixth Amendment right to counsel based on charges in a number of jurisdictions in Maryland and Virginia; he also had court-appointed counsel actively representing him at the time of the interrogation on November 7, 2002; there should have been no contact without counsel

Over a period of two weeks, Mr. Malvo was in Federal custody. He invoked and exercised his right to remain silent, he was represented by counsel through every stage of the proceedings and no law enforcement personnel were allowed access to him. Although Mr. Malvo was held in the vicinity of, and had appeared in court every time the Baltimore Federal Courthouse, during the day on November 7, 2002, a U.S. Attorney went to judges' chambers in

the Greenbelt Federal Courthouse and had the Federal charges against Mr. Malvo dismissed. The action was undertaken *ex parte* and not in open court. Not one of Mr. Malvo's five attorneys who had been appointed by the court to represent him was given any information about the action taken. Nor was any of his attorneys told what was happening to their client.

That same day, Judge Bredar, a Federal Judge in Baltimore, issued an order specifically providing that Mr. Malvo's attorneys were still court-appointed to represent him concerning any state charges, of which, at that time, they were pending in four Virginia jurisdictions, including Fairfax County. Also on November 7, 2002, upon finally hearing that Mr. Malvo was being transported to Virginia, one of Mr. Malvo's attorneys, Robert Tucker, Esquire, faxed a letter to the United States Attorney for the Eastern District of Virginia. In that correspondence, he indicated that no Federal authorities were to interrogate Mr. Malvo, and in the event that he was being transferred into state custody, no state or local law enforcement authorities were to interrogate Mr. Malvo.

Further, when the authorities brought Mr. Malvo into custody in Fairfax County, they violated the law. Virginia Code § 16.1-247, in pertinent part, provides

> B. A person taking a child into custody pursuant to the provisions of subsection B, C or D of § 16.1-246, during such hours as the court is open, shall, with all practicable speed, and in accordance with the provisions of this law and the orders of court pursuant thereto:
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> .
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> .
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> 3. If not released, bring the child to the judge or intake officer of the court and, in the most expeditious manner practicable, give notice of the action taken, together with a statement of the reasons for taking the child into custody, in writing to the judge or intake officer, and the judge, intake officer or arresting officer shall give notice of the action taken orally or in

> writing to the child's parent, guardian, legal custodian or other person standing in loco parentis . . . .

The intake office in the Fairfax County Juvenile and Domestic Relations Court is open until midnight.

At this point, it is necessary to reiterate and emphasize the language and standard adopted by both the United States and Virginia Supreme Courts:

> knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent.

Maine v. Moulton, 474 U.S. 159, 176 (1985); See also Frye v. Commonwealth, 231 Va. 370, 391 (1986). In this case, the Government went well beyond knowingly exploiting an opportunity to confront an accused without counsel being present and clearly illustrated "the intentional creation of such an opportunity." Every measure described above was actually and effectively designed to circumvent Mr. Malvo's right to have counsel present, and thus, based on those circumstances alone, Mr. Malvo's constitutional rights were violated.

Further, on November 7, 2002, Mr. Malvo had established an asserted Sixth Amendment right to counsel under Judge Bredar's order regarding four State charges. His court-appointed counsel were specifically ordered to continue representing him with regard to all collateral matters and state charges. Initially, it is noted that the United States Supreme Court established long ago that "the right to counsel does not depend on a request by the defendant." Brewer v. Williams, 430 U.S. 387, 404 (1977); see also Carnley v. Cochran, 369 U.S. 506, 513 (1962). Thus, it must be concluded that Mr. Malvo should not have been questioned in Virginia without an attorney

present, even before consideration of any of the circumstances directly surrounding the Fairfax interrogation. Under this analysis alone, Mr. Malvo's Sixth Amendment right to counsel was violated.

4. Mr. Malvo's Sixth Amendment Rights Were Violated When Police Initiated Interrogation in Fairfax

Despite the fact an assertion and/or invocation was not necessary to establish Mr. Malvo's right to counsel, steps were taken to do just that. After the well established position related to his Federal charges in Maryland that Mr. Malvo was not to be interrogated by law enforcement, his charges there were dismissed on November 7, 2002, *ex parte* in chambers, without any notice to his attorneys of the action, or to what location he was being sent.

When his attorneys were able to ascertain part of what was going on, one of Mr. Malvo's attorneys who were court-appointed to represent him concerning any state charges, Mr. Tucker, faxed correspondence to the United States Attorney for the Eastern District of Virginia reiterating that no law enforcement officers were to interrogate his client without counsel present. McNeil v. Wisconsin, 501 U.S. 171 (1991).

First, vicarious invocation of rights has been validated in constitutional law analysis. At the very least, when an attorney has been appointed to represent the accused, and law enforcement officers have expressly agreed with counsel that the accused will not be questioned, law enforcement cannot deliberately elicit information from the accused without the presence of his attorney. Brewer v. Williams, 430 U.S. 387 (1977). Based on the circumstances described herein, Mr. Malvo did vicariously invoke his Sixth Amendment right to counsel.

Additionally, after the accused's Sixth Amendment right to counsel has attached and the

accused has requested counsel, the police may not initiate interrogation of the accused without the presence of his attorney. Michigan v. Jackson, 475 U.S. 625, 636 (1986). Accordingly, Mr. Malvo's right to counsel was violated on these grounds as well.

5. Mr. Malvo's Sixth Amendment Rights Were Violated When Police Ignored His Request For An Attorney

To reiterate, after the accused's Sixth Amendment right to counsel has attached and the accused has requested counsel, the police may not initiate interrogation of the accused without the presence of his attorney. Michigan v. Jackson, 475 U.S. 625, 636 (1986).

Mr. Malvo invoked his right to counsel at the very beginning of his confrontation with the police. According to Detective Boyle, before any substantive questioning took place, Mr. Malvo asked "do I get to see my attorneys?", to which she responded "yes." Mr. Malvo then said his lawyer told him not to talk to the cops until they got there.

There is no question that Mr. Malvo asserted his Sixth Amendment rights as described herein. See Wilson v. Murray, 806 F.2d 1232, 1235 (4th Cir. 1986)(In granting relief from a Habeas petition related to a state court proceeding, the court stated "[a] defendant's statement that he *intends to arrange* representation is equivalent to a request for an attorney." (Emphasis added). Had the police simply ignored Mr. Malvo's request, that would be sufficient grounds to find that any subsequent statements were taken in violation of the Sixth Amendment and must be suppressed. In fact, the police lied by telling Mr. Malvo that he would see his attorneys before proceeding to ignore his request. Any subsequent waiver of the right to counsel is "insufficient to justify police-initiated interrogations after the request for counsel." Jackson, 475 U.S. at 635.

6. Based on the circumstances described, Mr. Malvo did not waive his Sixth Amendment right to counsel when he provided information pursuant to the

Miranda form.

While it is possible to waive the Sixth Amendment right to counsel, Patterson v. Illinois, 487 U.S. 285 (1988), any waiver of the Sixth Amendment must be knowing, intelligent, and voluntary, Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). As related earlier, after vicariously invoking his Sixth Amendment rights, Mr. Malvo asked if he could see his attorneys and advised Detective Boyle and Agent Garrett that he was not to speak with police officers outside his attorneys' presence. At that point, Mr. Malvo had not yet been apprized of the State court charges that had been filed against him. In fact, he was only provided with vague information that he was *being* charged in *Virginia*. It was never disclosed to Mr. Malvo that at least three different jurisdictions had already filed charges against him, two of which involved capital murder charges. This clear invocation of his rights is not undone by his later initialing and writing an "X" on the Miranda waiver of rights form and providing information, as his actions do not constitute a valid waiver of his rights which had previously been invoked.

First, and most importantly, Patterson includes a specific exception to its holding that a valid Miranda waiver suffices to waive the Sixth Amendment right to counsel: "we have permitted a Miranda waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning; in the Sixth Amendment context, this waiver would not be valid." Patterson, 487 U.S. at 296, n9. (citing Moran v. Burbine, 475 U.S. at 424). Law enforcement was well aware that Todd Petit was attempting to contact Mr. Malvo. No one passed on this information to inform Mr. Malvo's waiver.

Second, Mr. Malvo did not sign the form. This is not merely an argument as to whether a person's "mark" can be their signature. Mr. Malvo explicitly stated that would not sign the form

because "its self-incriminating." If he later decided that the potential self-incrimination was not an issue -- i.e., he was willing to waive his rights and provide a statement -- he would have signed. In this case, therefore, the "mark" of the "X" was not an alternative signature and therefore not a waiver. On the contrary, it was an alternative to his doing, saying or writing something self-incriminating. The "X" was clearly intended as indication that he did *not* wish to waive his rights and was *not* willing to incriminate himself.

Third, and regardless of the validity of Mr. Malvo's "signature" on the form, any alleged waiver is invalidated by the fact that the most crucial question of all for juvenile defendants was left blank – whether he would want a parent/guardian present before he was questioned. As the rest of the form was carefully "checked" as Mr. Malvo was advised of each right, the missing check was not a mere oversight, but an indication that this particular right was not fully explained. Where the accused is not fully informed, any "waiver" as to that form is not a knowing waiver, and is therefore invalid.

Fourth, one cannot waive rights of which he is unaware.

> In the past, this Court has held that a waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege . . . . In other words, the accused must kno[w] what he is doing so that his choice is made with eyes open . . . . In a case arising under the Fifth Amendment, we described this requirement as a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Patterson v. Illinois, 487 U.S. 285, 292 (1988).

The factors and circumstances here are compelling–Mr. Malvo was not informed that his guardian ad litem was trying to reach him; he twice invoked his right to counsel, despite not being adequately informed of the charges against him; he asked to see an attorney and advised that he

could not speak to police without an attorney present; the rights waiver form was not completed, indicating he had not been fully advised of his rights; finally, he refused to sign the waiver form as it might be "self-incriminating". These factors lead to the conclusion that Mr. Malvo *did not* waive his Sixth Amendment right to counsel.

6. Even if the Miranda form is considered a waiver of Mr. Malvo's Sixth Amendment right to counsel, it cannot be considered a waiver as to the Fairfax County charges, because the Sixth Amendment is "offense specific."

Mr. Malvo was not aware what new charges were pending in Fairfax County at the time he was questioned by Detective Boyle and Agent Garrett. As established above, because the Sixth Amendment right is "offense specific," it is not possible for an accused to waive his Sixth Amendment rights as to charges about which is he unaware. Thus, even if the Court were to find that in spite of the above-outlined factors, Mr. Malvo did waive his Sixth Amendment right to counsel, the Court cannot logically apply said waiver to the instant charges as Mr. Malvo *could not* have waived a right specifically attached to charges of which he had no knowledge. Again, while the Sixth Amendment does not necessarily extend to offenses that are simply "factually related" to those that have actually been charged, Texas v. Cobb, 532 U.S. 162 (2001), that rationale is necessarily also applied to an analysis of Sixth Amendment waiver. Thus, if for some reason the Miranda waiver of rights form is deemed a waiver of Mr. Malvo's Sixth Amendment rights, what exactly could he be deemed to have waived? He did not know what or how many charges were filed against him or even what county he was in. Therefore, at the time of his interrogation by Detective Boyle on November 7, 2002, Mr. Malvo could not have waived his right to counsel concerning the Fairfax County charges because he did not know of their

existence or nature.

B. MR. MALVO'S FIFTH AMENDMENT RIGHTS WERE VIOLATED

1. Violation pursuant to Edwards v. Arizona, *et al.*

a. Invocation of rights while being held in Maryland

The Supreme Court's decision in Edwards v. Arizona, 451 U.S. 477 (1981) established that a defendant who invokes his Fifth Amendment right to counsel should not be subject to further interrogation until counsel has been made available, unless the accused himself initiates contact. The Edwards case involved a defendant who had invoked his rights to counsel, but then subsequently waived those rights when the police later initiated a new conversation with him. This waiver was deemed invalid.

> We now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85. In Fifth Amendment analysis, Edwards created a continuing protection against any police-initiated interrogation for defendants in custody who have invoked a right to counsel.

It is also important to note what does not constitute the initiation of further communication by the accused in the Edwards sense. Requests for food or the use of a telephone are routine and are therefore not considered new communication. Additionally, responding to routine booking questions, even if legitimately asked, is also not considered further communication under Edwards. Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983).

It must also be remembered that the continuing protection established by Edwards is consistent with and applied to other aspects of traditional Fifth Amendment analysis. The Court has ruled that Fifth Amendment protections are not charge specific, and that the Edwards rule against police initiated communications apply to subsequent investigations of different and unrelated charges. Arizona v. Roberson, 486 U.S. 675 (1988). Additionally, the government cannot justify any subsequent, police-initiated communications based on a lack of knowledge of a second investigating officer from a different jurisdiction. For example,

> Finally, we attach no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel. In addition to the fact that Edwards focuses on the state of mind of the suspect and not of the police, custodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel.

Roberson, 486 U.S. at 687.

Mr. Malvo's Fifth Amendment right to counsel was invoked prior to his interrogation in Virginia throughout the proceedings against him in Federal court, and explicitly by Mr. Tucker as Mr. Malvo was being transferred from jurisdiction to jurisdiction en route to Fairfax. Mr. Malvo was first taken into custody on October 24, 2002 based on a Federal Material Witness warrant. He was then held on a 20-count Criminal Information alleging criminal conduct in Maryland, The District of Columbia and Virginia. He was held in custody in Maryland continuously until November 7, 2002, at which time he was transferred to Virginia. However, while in Maryland, even though he was approached and questioned by law enforcement authorities, he remained silent, and never waived his 5th Amendment rights.

Additionally, while in custody during that time period, Mr. Malvo's attorneys in Maryland

vicariously invoked (and/or reiterated) his right to counsel. Messrs. Treem, Tucker and Kramer made it consistently clear that no law enforcement officers were permitted to speak with Mr. Malvo outside of their presence. This was the general position and understanding, which was put forth first when Mr. Treem responded to public comments by a Maryland state prosecutor; again during at the time of his detention hearing (when even the judge acknowledged in an order that Mr. Malvo would not be speaking with authorities), and a third time when Mr. Tucker directly notified U.S. Attorneys in Virginia, immediately upon learning that Mr. Malvo was going to be transported to their jurisdiction.

The understanding that Mr. Malvo's right to counsel had been invoked was also not limited to one prosecuting office or one law enforcement agency. For example, the October 24, 2002 hearing was attended by representatives from the United States Attorney's office, the A.T.F., the F.B.I., the U.S. Marshals Service and U.S. Pretrial Services. One result of that hearing was an order from the judge, which, among other things, established that, upon representation of counsel, Mr. Malvo would not even be speaking to anyone at the U.S. Pretrial Services office.

These facts relating to vicarious invocation of the right to counsel are directly analogous to the circumstances in Williams v. Brewer, 430 U.S. 387 (1977), wherein the Court stated that the defendant "had effectively asserted his right to counsel by having secured attorneys at both ends of the automobile trip, both of whom, acting as his agents, had made clear to the police that no interrogation was to occur during the journey." Id. at 405. In deciding that the defendant's Constitutional rights had been vicariously invoked and subsequently violated, the Court placed significant emphasis on the defendant's knowledge of the agreement (invocation of rights) and his

prior "consistent reliance on counsel." In this case, Mr. Malvo's knowledge of the prior vicarious invocation was made clear by his consistent silence in all interactions while in custody in Maryland *and* during his interrogation in Virginia both when he initially stated "do I get to see my attorney?" (to which Detective Boyle responded "yes") and when he stated that his lawyer told him not to talk to the cops until they got here.

Mr. Malvo's constitutional right to counsel had been vicariously invoked while he was in custody in Maryland. Despite that, he was transferred out of Maryland without the knowledge of or notice to his attorneys, who along with all other involved parties in Maryland were never informed that a United States Attorney was going to travel to the Greenbelt courthouse and have the Federal charges dismissed. Additionally, when he was transferred to Virginia, instead of being brought before an intake officer as provided by law (Virginia Code § 16.1-247(B)(3)), he was held for an entire day without contact with any attorney and then intentionally interrogated by both Federal and State law enforcement authorities. His continued custody coupled with the interrogation that was not initiated by him, established a clear constitutional violation pursuant to Edwards, et al.

Since Mr. Malvo's Fifth Amendment right to counsel had been invoked, no law enforcement authorities were constitutionally permitted to question him without an attorney being present. Further, the Commonwealth cannot hide behind the guise that an interrogation was not intended, or that the questioning was pursuant to routine booking. Brewer, supra., establishes that police behavior which is designed to elicit incriminating statements constitutes an initiation of an interrogation.

b. Invocation of rights during beginning of interrogation on November

7, 2002

After violating Mr. Malvo's Fifth Amendment right to counsel by initiating the interrogation in Fairfax, the police further violated that right under Edwards when they failed to respect Mr. Malvo's request for counsel at the outset of the interrogation. In determining whether a suspect has invoked his Fifth Amendment right to have counsel present during an interrogation, courts should examine whether the suspect clearly articulated his desire in such a manner that a reasonable officer in the circumstances would understand it to be a request for an attorney. Davis v. United States, 512 U.S. 452, 459 (1993). Additionally, in requesting an attorney, a defendant is "not required to 'speak with the discrimination of an Oxford don.'" Davis, 512 U.S. at 459, McDaniel v. Commonwealth, 28 Va. App. 432, 436 (1998).

In the McDaniel case, the Virginia Court of Appeals established that the statement "I think I would rather have an attorney here to speak for me" was clear enough to establish the defendant's invocation of his Fifth Amendment rights. Interestingly, in McDaniel, the defendant uttered the invocation *after* the detective had read his Miranda rights to him from a pre-printed form. Thus, he had the benefit of being reminded of that right to counsel. Further, McDaniel had just been taken into custody and had not actually been given an opportunity to talk to or meet with an attorney to that point -- thus the choice of the phrase *an attorney* versus *my attorney*. Both of these points are distinctions between McDaniel and this case, and both cut to the benefit of Mr. Malvo's argument.

In this case, according to Detective Boyle, before any substantive questioning took place, Mr. Malvo asked "do I get to see my attorneys?", to which she responded "yes." Mr. Malvo then said his lawyer told him not to talk to the cops until they got there. It was then explained to him

that he was being charged in Virginia with new charges *and that the police wanted to get some information about him.*

Mr. Malvo had been in custody for fifteen days preceding his interrogation on November 7, 2002. He had been represented by appointed counsel for fourteen of those days – counsel with whom he had met, and appeared in court on several occasions.[1] Despite the fact the federal charges had been dismissed (in chambers) on that day, Mr. Malvo had never been made aware of that and he therefore logically assumed he still had counsel representing him. His assumption was entirely accurate based on Judge Bredar's November 7, 2002 order. Given that Mr. Malvo had experienced ongoing representation by and reliance upon his attorneys prior to his interrogation, there was a lower burden upon him to let the detectives know he wanted to meet with counsel, as there was already an established and publicized attorney-client relationship. Particularly since he had not yet received Miranda warnings at that point. He specifically asked if he would get to see *his* attorneys and was told "yes." Likewise, given these background circumstances, any reasonable officer would have interpreted such a statement as a request for counsel, which Officer Boyle and F.B.I. Agent Garrett clearly did, in answering his question affirmatively. The fact that Detective Boyle proceeded to intentionally deceive Mr. Malvo and misrepresent her purpose in interrogating him does not change this analysis. Under Edwards any further police initiated interrogation required the presence of counsel. There was no reinitiation by Mr. Malvo. See Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983). Any subsequent waiver of Miranda rights does not cure the violation of Mr. Malvo's Fifth Amendment right to counsel and his statements

[1] Also notable: at two such proceedings, at least two F.B.I. agents were present when the issue of Mr. Malvo's refusal to speak with law enforcement was discussed on the record.

must be suppressed as evidence. Edwards, 451 U.S. at 484-85.

While the Commonwealth may rely on cases such as Commonwealth v. Redmond, 264 Va. 321 (2002); those cases are distinguishable based on the distinctions cited above. For instance, *after* Miranda warnings, the Redmond defendant inquired about *a* lawyer, obviously not having someone who was, at that time, *his* lawyer. There was no history of representation and ongoing attorney-client relationship involved.

2. Mr. Malvo's invocations of his right to remain silent were not scrupulously honored

Police need not "'accept as conclusive any statement, no matter how ambiguous, as a sign that the suspect desires to cut off questioning.'" Midkiff v. Commonwealth, 250 Va. 262, 267, 462 S.E.2d 112 (1995) (quoting Lamb v. Commonwealth, 217 Va. 307, 312, 227 S.E.2d 737, 741 (1976)). Nevertheless, if a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Miranda, 384 U.S. at 473-74. The right to remain silent is not subject to the "unambiguous request" rule which the Supreme Court outlined for the Fifth Amendment right to counsel in Davis v. United States, 512 U.S. 452, 459 (1994).[2]

Mr. Malvo expressed his desire to remain silent on several occasions, including at least one specific instance where he invoked his right to silence in an interrogation setting while in

[2] Without discussion, the Court of Appeals of Virginia applied the unambiguous request rule to the right to remain silent in Green v. Commonwealth, 27 Va. App. 646, 653, 500 S.E.2d 646 (1998). The rule in Davis, however, that a suspect must unambiguously request counsel is based on the fact that the Supreme Court was unwilling to provide a "third layer of prophylaxis" over the rule in Edwards v. Arizona, 451 U.S. 477 (1981), which is itself a "'second layer of prophylaxis.'" Davis, 512 U.S. at 458, 462 (quoting McNeil v. Wisconsin, 501 U.S. 171, 176 (1991)). The right to remain silent, in contrast, is a core Fifth Amendment right. See U.S. Const., Amend. V.

Federal custody in Maryland. His desire to remain silent was made perfectly clear in Federal court on October 24, 2002 when he remained silent in response to the most basic of questions. When the court asked if he "decline[d] to answer the question," Mr. Malvo nodded his head, indicating yes. In the context of the prophylactic Fifth Amendment right to counsel, the courts have observed that a defendant is "not required to 'speak with the discrimination of an Oxford don.'" McDaniel v. Commonwealth, 28 Va. App. 432, 436, 506 S.E.2d 2 (1998) (quoting Davis, 512 U.S. at 459). The same is even truer of the core Fifth Amendment right not to incriminate oneself.

After a suspect has invoked the right against self-incrimination, the police must "scrupulously honor" the exercise of that right. See Michigan v. Mosley, 423 U.S. 96, 104 (1975). Because Mr. Malvo invoked his constitutional right not to incriminate himself, and this invocation was not scrupulously honored all statements from him were obtained in violation of Miranda and must be suppressed.

3. The burden is on the Commonwealth to prove that any relevant waiver was knowing, intelligent and voluntary

Under the discussions above, this Court will not reach the question of whether there was a valid waiver under Miranda. However, if that question is reached it is clear that the burden is on the Commonwealth to prove that any waiver of Fifth Amendment rights was knowing, intelligent and voluntary. See Bradshaw, 462 U.S. at 1045; Giles v. Commonwealth, 28 Va. App. 527, 532 (1998); Smith v. Illinois, 469 U.S. 91, 98 (1984). The prosecution bears a "heavy burden" to prove that a suspect waived his or her Miranda rights. See Tague v. Louisiana, 444 U.S. 469, 470 (1980) (per curiam); see also, e.g., Mills v. Commonwealth, 14 Va. App. 459, 468, 418

S.E.2d 718 (1992).

4. Mr. Malvo's initial statements to police on November 7, 2002 must be suppressed under Miranda and the subsequent statements must be suppressed as fruit of the poisonous tree

The initial interrogation of Mr. Malvo by Officers Boyle and Garrett without administering Miranda warnings clearly violated the requirements of Miranda. "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444 (1966).

This Court should suppress evidence of the subsequent interrogation of Mr. Malvo, whether independently lawful or not, because it is derivative of the initial, unlawful interrogation. The Supreme Court held in Oregon v. Elstad, 470 U.S. 298 (1985), and Michigan v. Tucker, 417 U.S. 433 (1974), that "fruit of the poisonous tree" analysis did not apply to violations of Miranda v. Arizona, 384 U.S. 436 (1966) because Miranda's protections were not constitutional in nature. In Dickerson v. United States, 530 U.S. 428 (2000), the Supreme Court held, however, that Miranda's protections were constitutional in nature. Accordingly, this Court should apply the traditional constitutional rule that the fruit of unconstitutional police activity is itself inadmissible.

Traditionally, the exclusionary rule "'extends as well to the indirect as the direct products' of unconstitutional conduct." Segura v. United States, 468 U.S. 796, 804 (1984) (citations omitted). "[T]he exclusionary sanction applies to any 'fruits' of a constitutional violation – whether such evidence be tangible, physical material seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention." United States v. Crews, 445 U.S. 463,

470 (1980) (footnotes omitted).

In Michigan v. Tucker, 417 U.S. 433 (1974), the United States Supreme Court held that a trial court need not suppress the testimony of a witness whose identity was discovered as a result of a statement taken in violation of Miranda. The Court concluded that the unwarned questioning "did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in Miranda to safeguard this privilege." Id. at 446.

Similarly, in Oregon v. Elstad, 470 U.S. 298 (1985), the Supreme Court held that the exclusionary rule did not extend to a suspect's own warned statement subsequent to a Miranda violation. The Court noted, "Respondent's contention that his confession was tainted by the earlier failure of the police to provide Miranda warning and must be excluded as 'fruit of the poisonous tree' assumes the existence of a constitutional violation." Id. at 305. The Court explained, "The Miranda exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. . . . Thus, in the individual case, Miranda's preventative medicine provides a remedy even to the defendant who suffered no identifiable constitutional harm." Id. at 306-07.

Title 18 U.S.C. § 3501, a federal statute, purported to replace Miranda analysis with a totality-oriented voluntariness test. Relying on the Supreme Court's reasoning that "Miranda warnings [are] 'prophylactic,' New York v. Quarles, 467 U.S. 649, 654 (1984), and 'not themselves rights protected by the Constitution,' Michigan v. Tucker, 417 U.S. 433, 444 (1974)," the Fourth Circuit held that 18 U.S.C. § 3501 legislatively overruled Miranda. United States v. Dickerson, 166 F.3d 667, 672 (4th Cir. 1999).

The United States Supreme Court, however, rejected the Fourth Circuit's suggestion that Congress could overrule Miranda. The Court canvassed its prior decisions and held "that Miranda announced a constitutional rule that Congress may not supersede legislatively." Dickerson v. United States, 530 U.S. 428, 444 (2000).

Accordingly, Dickerson removed the foundation of Tucker and Elstad. Tucker and Elstad rested on the proposition that fruit of the poisonous tree analysis did not apply to Miranda violations because Miranda violations were not constitutional in nature. The Supreme Court has now held that Miranda did announce a constitutional rule, and the exclusionary rule exceptions announced in Tucker and Elstad are no longer good law.

This Court should therefore apply traditional exclusionary rule analysis. "The question to be resolved when it is claimed that evidence subsequently obtained is 'tainted' or is 'fruit' of a prior illegality is whether the challenged evidence was 'come at by exploitation of [the initial] illegality or instead by means *sufficiently distinguishable* to be purged of the primary taint.'" Segura, 468 U.S. at 804-05 (alteration and emphasis in original; internal quotation marks omitted). The government bears the burden of showing that the connection is sufficiently attenuated to be purged of the initial taint. Brown v. Illinois, 422 U.S. 590, 603 (1975). The Commonwealth will not be able to meet this high burden, and this Court should suppress Mr. Malvo's statements.

Even if this Court does not hold that Dickerson overrules Elstad, the Elstad Court left room for an exception to its holding. The Court noted that after an accused has "let the cat out of the bag by confessing . . . he is never thereafter free of the psychological and practical disadvantages of having confessed . . . in a sense a later confession can always be looked upon as

fruit of the first." Id., at 311. The exception in the opinion is manifested by the fact that the Court's holding is valid absent circumstances where the police use deliberately coercive or improper tactics to obtain the initial statement.

The questioning in this case falls under this implied exception. The officers intentionally ignored Mr. Malvo's statements about his lawyer, and then deviously used the guise of routine booking questions to obtain the initial incriminating statements. Although the parties must rely on the "substance of oral statement" to ascertain what was asked and answered in the initial phase of the interrogation, and this is provided in summary fashion, it is clear that the officers kept Mr. Malvo talking for an extended period of time about a variety of topics, unrelated to booking questions. The clear intention was to catch Mr. Malvo off-guard and lead him into incriminating information. Thus, in this case, the statement was derived from illicit action on the part of the police, and the Miranda warnings were given immediately *after* Mr. Malvo had been tricked into "letting the cat out of the bag." Accordingly, the officers actions were in violation of the Fifth Amendment, and the statements should be suppressed.

5. The statements must be suppressed as involuntary under the Due Process Clause of the Fifth Amendment

"'It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession. Equally clear is the defendant's constitutional right at some stage in the proceedings to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness, a determination uninfluenced by the truth or falsity of the confession." Jackson v. Denno, 378 U.S. 368, 376-77 (1964) (citations omitted).

In order to use Mr. Malvo's statements for any purpose at trial, the Commonwealth must prove by a preponderance of the evidence that the confession was voluntary. See Lego v. Twomey, 404 U.S. 477, 489 (1972). This Court must examine "whether the statement was the 'product of an essentially free and unconstrained choice by its maker,' or whether the maker's will 'has been overborne and his capacity for self-determination critically impaired.'" *Bottenfield v.* Commonwealth, 25 Va. App. 316, 323, 487 S.E.2d 883 (1997) (quoting Commonwealth v. Peterson, 15 Va. App. 486, 487-88, 424 S.E.2d 722, 723 (1992)).

In determining the voluntariness of the statements, this Court considers the "totality of the circumstances." E.g., Rodgers v. Commonwealth, 227 Va. 605, 609, 318 S.E.2d 298, 300 (1984). "In examining the totality of the circumstances surrounding a [statement], a court must consider a myriad of factors, including the defendant's age, intelligence, background and experience with the criminal justice system, the purpose and flagrancy of any police misconduct, and the length of the interview." Mundy v. Commonwealth, 11 Va. App. 461, 476, 390 S.E.2d 525 (1990) (en banc).

D. MR. MALVO'S RIGHTS UNDER THE VIENNA CONVENTION ("VCCR") WERE VIOLATED

As discussed earlier, Lee Boyd Malvo is a Jamaican citizen, and both his status and nationality were known prior to his apprehension in Maryland and were immediately determinable by the Fairfax County and other Virginia prosecuting authorities upon his transfer to Virginia.

Pursuant to the Vienna Convention on Consular Relations (VCCR), ratified by the United States in 1969:

> [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending States if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.*

Art. 36, Para. 1(b) of 21 U.S.T. 100, T.I.A.S. # 6820 (emphasis added). This treaty, which guarantees consular officials of signatory nations access to nationals who need assistance while traveling abroad, merely formalized what had already been customary international law practice. See, In re Paquete Habana, 20 S.Ct. 290 (1900). It is also *binding authority* not only on the United States, but on the Commonwealth of Virginia, pursuant to the Supremacy Clause which holds that ". . . all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Although the F.B.I. did send a notification via facsimile to the Jamaican embassy on October 24, 2002, shortly after Mr. Malvo was initially arrested, authorities *did not* inform Mr. Malvo of his rights under the VCCR. Furthermore, when Mr. Malvo was moved into Virginia, the consulate was not notified of the move or of his new location, nor of the charges against him *at any time*. Finally, once in the Commonwealth of Virginia, Mr. Malvo was interrogated without ever having been informed of his rights to consult with consular officials. He was *never* informed of his rights, despite the mandatory language of the treaty, and the fact that law enforcement personnel are trained how to proceed in accordance with the VCCR. When the directives of the

VCCR are ignored, the objectives are defeated and more importantly, however, the supreme law of the Land is violated. There must be a remedy for such failures, and without judicial enforcement of the VCCR, prosecuting authorities will have no incentive to correct this *illegal* conduct.

Given the status of the VCCR as "supreme law", the failure to advise Mr. Malvo of his rights guaranteed thereby is analogous to a failure to advise of the rights guaranteed by other portions of the Constitution. Clearly, our law has already solidified the notion that these rights must be safeguarded, and does so by the creation and use of rules of notification. "[W]ithout proper safeguards the process of custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individuals' will to resist and to compel him to speak where he would not otherwise fo so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self incrimination, the accused must be adequately and effectively appraised of his rights and the exercise of those rights must be fully honored." Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). Such safeguards are far more crucial in cases of juvenile defendants, in whose cases, again, "the greatest care must be taken . . ." in analyzing the lawfulness of interrogation and the admissibility of inculpatory statements. In re Gault, 387 U.S. 1, 55 (1967).

These decisions predate the VCCR by three and two years, respectively, but suggest that the same procedural safeguards and heightened scrutiny must be applied to juvenile's rights under the VCCR to prevent due process violations and afford the "supreme law of the Land" the deference warranted. In this and so many other cases, however, the law has been ignored with no consequence.

The Commonwealth's argument will no doubt be one of "precedent," for frankly, precedent is on its side. The Supreme Court of Virginia has repeatedly held that Article 36 of the VCCR does not create legally enforceable individual rights that a defendant may assert and that even if it *did* (interesting qualifier), the violation of those rights should not be remedied by suppression of evidence. See, e.g., Bell v. Commonwealth, 264 Va. 172, 187-88, 563 S.E. 2d 695, 706-07 (2002); Shackleford v. Commonwealth, 260 Va. 196, 207, 547 S.E. 2d 899, 905 (2001); Kasi v. Commonwealth, 256 Va. 407, 419, 508 S.E. 2d 57, 64 (1988), cert. denied, 527 U.S. 1038 (1999);

To the dearth of "precedent" there are at least three viable responses. First and foremost, the VCCR itself is and should be *primary* precedent on the issue of what the treaty itself requires and anticipates. It obviously predates the opinions erroneously interpreting it, and it is neither vague nor ambiguous in its terms. It states quite simply what authorities *shall*, i.e., *must* do. If it is not done, the law is violated, as proper notice is not given the accused of his or her rights. In nearly all circumstances, without proper notice of his or her rights, any interrogation of the accused is deemed unlawful. In State of Delaware v. Reyes, 740 A.2d 7 (Del. 1999) the court held favorably for the individual's right and a remedy for violation of the VCCR. The trial judge suppressed the statement taken prior to the defendant being informed of his rights under the VCCR and the government appealed the decision to the Delaware Supreme Court, arguing that the defendant lacked standing under the treaty and that suppression was not the remedy under the VCCR. The government's appeal was denied. State v Reyes, 234 F.3d 78 (1st Cir. 2000). Additionally, in juvenile cases especially, failure to notify *other* parties – where the notification is aimed at protecting the juvenile's rights – has been a basis for suppression. See, e.g., United

States v. Doe, 170 F.3d 1162, 1168 (9th Cir. 1999) (dealing with parental notification).

Second, "The essential principle of international law is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." Restatement (Third) of the Law of Foreign Relations, 901 (1987). So under international law, the recognized remedy for a treaty violation is to restore the status quo ante and to put the parties back to the position they occupied before the violation took place.

Third, there is no precedent to the instant case. Mr. Malvo is a juvenile, foreign national, facing capital murder charges. While there are cases involving two of those three factors, Mr. Malvo faces the dubious distinction of being an issue of first impression – an opportunity for this Court to be right.

III. CONCLUSION

In light of the foregoing, all of the statements made by Lee Boyd Malvo during the interrogation that began November 7, 2002 were obtained in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, the Supremacy Clause of the Constitution and the Vienna Convention on Consular Relations and must be suppressed as evidence in this case.

Respectfully Submitted,
LEE BOYD MALVO

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was mailed, first class to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney
4110 Chain Bridge Road, Rm 123
Fairfax, VA 22030

and the original was forwarded for filing to:

Hon. John T. Frey
Clerk of Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, VA 22030

and a true copy was forwarded to the:

Hon. Jane Marum Roush
Judge, Fairfax County Circuit Court
4110 Chain Bridge Road
Fairfax, VA 22030

this 11 day of April, 2003.

_____
Co-Counsel

Suppression Exhibit List

1. Birth Certificate of Lee Boyd Malvo

2. Transcript of January 14, 2003 Preliminary Hearing in General District Court (selected pages)

3. Federal Material Witness Warrant

4. Transcript of October 24, 2002 Detention Hearing in the United States District Court for the District of Maryland, Northern Division (Baltimore), (selected pages)

5. Judge Bredar Order of October 24, 2002 appointing counsel for Mr. Malvo

6. Judge Bredar Order of October 29, 2002 dismissing material witness charges

7. Federal Information charging John Doe, Juvenile (Lee Boyd Malvo)

8. Charges from State District Court of Maryland for Montgomery County filed October 25, 2002

9. Petitions for Juvenile Charges; Documents from Spotsylvania County dated October 25, 2002

10. Direct Indictment of John Muhammad, Spotsylvania County dated October 28, 2002

11. United States District Court for the District of Maryland Order appointing Counsel dated October 29, 2002

12. United States District Court for the District of Maryland Order appointing Guardians Ad Litem dated October 29, 2002

13. Transcript of Hearing in United States District Court for the District of Maryland, November 4, 2002

14. Order issued by the United States District Court for the District of Maryland dated November 4, 2002

15. Order issued by the United States District Court for the District of Maryland, Some other Division (Greenbelt) dated November 7, 2002, dismissing Federal charges

16. Order issued by the United States District Court for the District of Maryland changing local rules

17. Order issued by the United States District Court for the District of Maryland dated

November 7, 2002, requiring continued representation

18. Facsimile cover page, confirmation slip, and letter sent by Tucker to McNulty dated November 7, 2002

19. Order of Judge Bredar requiring consular notification.

20. Petition charging Lee Boyd Malvo in Juvenile and Domestic Relations Court dated November 6, 2002

21. Juvenile and Domestic Relations Court order appointing Todd G. Petit dated November 7, 2002

22. "Substance of Oral Statements" document provided by the Commonwealth

23. Miranda Rights Form provided by the Commonwealth

24. Order of Juvenile and Domestic Relations Court appointing Michael S. Arif, Thomas Walsh, and Mark Petrovich as counsel for Lee Boyd Malvo

** PLEASE NOTE: WE ARE HAPPY TO PROVIDE ANY OF THE ABOVE DOCUMENTS TO YOUR OFFICE TO ASSIST YOU IN REACHING YOUR DETERMINATION